

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

V.

AND

Docket No. 1,070,678

ORDER

The parties appealed the November 16, 2015, Award¹ entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on March 15, 2016.

APPEARANCES

Jonathan E. Voegeli of Wichita, Kansas, appeared for claimant. Gregory D. Worth of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated claimant sustained a 5 percent whole person functional impairment for his low back injury as a result of his April 14, 2014,

¹ The administrative file also contains a November 17, 2015, Nunc Pro Tunc Award correcting clerical errors in the November 16, 2015, Award.

accident. The parties also agreed the Board can consult the entire *Guides*² in making its findings.

ISSUES

ALJ Sanders found claimant sustained a 5 percent whole body functional impairment for a low back injury and awarded permanent partial disability benefits accordingly. Although Dr. George G. Flutter opined claimant additionally sustained a 4 percent whole body functional impairment for right leg atrophy and bilateral sacroiliac joint dysfunction, the ALJ found those were subjective complaints not documented by objective medical evidence. The ALJ also ordered respondent to provide claimant a pain management evaluation, which “will determine as to what Claimant requires to address his pain and what is required to cure and relieve the effects of the accidental injury.”³

Claimant asks the Board to modify the Award by finding he sustained a 9 percent whole body functional impairment. Claimant requests the Board affirm the ALJ’s finding with regard to future medical benefits.

Conversely, respondent asks the Board to affirm the ALJ’s finding that claimant sustained a 5 percent whole body functional impairment and to modify the finding regarding future medical benefits.

The issues are:

1. What is the nature and extent of claimant’s disability?
2. Is claimant entitled to future medical treatment?

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted. The parties cannot cite the *Guides* without the *Guides* having been placed into evidence. *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997). The Board has ruled against exploring and discussing the *Guides*, other than using the Combined Values Chart, unless the relevant sections of the *Guides* were placed into evidence. E.g., *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951 (Kan. WCAB Sept. 15, 2011) and *Dunfield v. Stoneybrook Retirement Com.*, No. 1,031,568, 2008 WL 2354926 (Kan. WCAB May 21, 2008).

³ ALJ Award at 9.

FINDINGS OF FACT

On April 14, 2014, claimant sustained a compensable work-related back injury by accident. Claimant, while using a bar to maneuver a laundry cart, fell backwards and landed on his buttocks when the bar slipped. When he moved the cart again, he felt a pop in his back and immediately had pain. Additional details of his accident are contained in the Award and are incorporated herein by reference. Claimant did not miss any work as the result of his accident.

Claimant testified his pain starts in the middle of his back and then descends to the lower back over to his right side, "And, then, it goes down my hip, then, it goes down the front of my leg and all the way down my legs and it feels like pins and needles just jabbing at me in my feet."⁴ He takes Percocet and Soma, which are necessary for him to function.

Diana K. Ketterman, M.D., was claimant's family physician in the late 1980s and early 1990s. The doctor again began treating claimant in 2005 and last saw him on August 14, 2015. She primarily treated claimant for personal health conditions. On April 17, 2014, Dr. Ketterman saw claimant for a personal health condition and he also reported a back injury at work, with pain radiating into his right leg. Dr. Ketterman recommended he see a company doctor for his back injury. Claimant had never previously treated with Dr. Ketterman for a back injury.

According to Dr. Ketterman, prior to claimant's work accident, he never requested, nor did she prescribe, pain medications. A couple of days after the April 17 visit, claimant called Dr. Ketterman and requested pain medication, which she prescribed. Dr. Ketterman indicated that since claimant's accident she prescribed three types of muscle relaxants, Percocet and Norco for claimant and recommended he not drive because of the pain medication. The doctor indicated the pain medication reduced claimant's pain, so she continued the prescriptions.

Dr. Ketterman indicated claimant's complaints remained constant. The doctor never observed claimant magnifying his symptoms. At claimant's last visit, he walked dragging his right leg and had palpable spasms in his thoracic area. In December 2014, Dr. Ketterman ordered a cane for claimant so he would not fall. Dr. Ketterman recommended claimant undergo a pain management evaluation to formulate a plan to alleviate his pain without dependence on pain medication for the rest of his life. Without further evaluation, Dr. Ketterman believed claimant would continue to need medication to relieve his work injury symptoms and to perform activities of daily living.

Dr. Ketterman saw claimant's May 1, 2014, lumbar spine MRI and felt it showed a bulging disc. She also reviewed claimant's EMG results. She was unaware claimant

⁴ R.H. Trans. at 22.

underwent a right hip MRI or a bone scan and had not reviewed Dr. Estivo's records. In making her diagnoses and treatment recommendations, Dr. Ketterman primarily relied on her experience, her physical examinations of claimant and his subjective reports.

When Dr. Ketterman saw claimant on August 14, 2015, he reported suffering a new back injury at work. Dr. Ketterman did not adjust claimant's pain medication as a result of the new injury, but did change his muscle relaxant.

Board-certified orthopedic surgeon John P. Estivo, D.O., treated claimant from August 7 through September 26, 2014. On August 7, claimant presented with lumbar spine and right hip pain. Dr. Estivo reviewed a May 1, 2014, lumbar spine MRI that showed minimal early degenerative disc disease at L2-3, but no other abnormalities. The doctor also noted claimant underwent EMG/nerve conduction tests of the lower extremities,⁵ which revealed a moderate degree of peripheral neuropathy, multiple levels of spondylosis bilaterally, but no radiculopathy. The doctor ordered lumbar spine, right hip and right femur x-rays. The x-rays showed no acute abnormalities.

Dr. Estivo indicated claimant overreacted to a very slight touch along the right side of the lumbar spine, there was tenderness with any movement of the lumbar spine and that he "does seem to be exaggerating his responses."⁶ The doctor noted claimant's right thigh was non-tender, but there was tenderness when his right hip was palpated. Dr. Estivo's diagnoses were symptom magnification, lumbar spine pain and right hip pain. He recommended a right hip MRI, bone scan and that claimant stay off narcotics, placed claimant on pain and anti-inflammatory medications and provided temporary restrictions.

Dr. Estivo saw claimant again on August 18, after claimant underwent the right hip MRI and bone scan, neither of which showed acute abnormalities. The doctor's diagnoses were symptom magnification, lumbar spine strain and right hip strain. Dr. Estivo again noted claimant was tender to the slightest touch of the lumbar spine and right hip. The doctor indicated claimant had full range of motion of the right knee and ankle and the right ankle and calf were non-tender. Claimant had full range of motion of his left hip, knee and ankle.

On September 11, Dr. Estivo saw claimant again. The doctor indicated claimant continued having tenderness on the right side of his lower back and he had right hip discomfort throughout range of motion. The doctor noted claimant had no tenderness over the right hip greater trochanteric bursa. Claimant had to be repeatedly asked to try to walk normally because he walked with a stiff right leg and was guarding the right side of his lower back. Dr. Estivo stated:

⁵ The EMG was conducted by Dr. Hassan on July 9, 2014.

⁶ Estivo Depo., Ex. 2.

The patient's subjective complaints are way out of proportion to any objective findings on physical examination or with his diagnostic tests that he has undergone. He appears to be dealing with a lumbar spine strain and a right hip strain. All of his other studies are basically normal, including nerve conduction study/EMG to the right lower extremity. . . . The patient does exaggerate his reactions. He does demonstrate symptom magnification. He has very little tolerance for discomfort. . . . I continue to try to give him the benefit of the doubt. I think it is reasonable he can be dealing with a lumbar spine strain and some degree of a right hip strain, but his symptoms are way out of proportion to anything that is found objectively. I will reevaluate him in two weeks.⁷

Dr. Estivo, on September 26, indicated claimant was at maximum medical improvement. The doctor's final diagnoses were lumbar spine strain and symptom magnification. Dr. Estivo, using the *Guides*, placed claimant in DRE Lumbosacral Category II and assigned a 5 percent whole person functional impairment. The doctor imposed restrictions of lifting no more than 50 pounds and no constant bending and twisting. Dr. Estivo indicated he had no ongoing treatment recommendations for claimant. The doctor prescribed no medications for claimant after September 26 and indicated he does not require any prescription medications.

At the request of claimant's counsel, on December 2, 2014, George G. Fluter, M.D., evaluated claimant. The doctor took a history, physically examined claimant and reviewed his medical records. Claimant reported pain affecting the right side of his low back, right buttock and right lower extremity, including a pins and needles sensation in the right foot. Claimant reported weakness and numbness in his right lower extremity. He made no left-sided complaints. Claimant rated his pain as 7 or 8 on a pain scale where 10 is the worst pain. His usual pain was described as unbearable and very severe. Lying down, sitting, standing, walking, bending, twisting and exercising made the pain worse and the pain did not stop when the activities ceased. Claimant's pain was constant and had no pattern.

Claimant was taking several medications, including Norco (a combination analgesic medication containing hydrocodone), Skelaxin (a muscle relaxant) and Neurontin (an anticonvulsant often used to treat chronic pain). Dr. Fluter did not know if claimant was taking pain medications before his accident. The doctor noted claimant was treated with medications and physical therapy only.

The impressions noted by Dr. Fluter of claimant's right hip MRI and the x-rays ordered by Dr. Estivo were similar to those noted by Dr. Estivo. However, Dr. Fluter indicated claimant's lumbar spine MRI also revealed a slight broad-based posterior disc bulge at L2-3. Dr. Fluter also reviewed April 22, 2014, lumbar x-ray reports, which noted some multilevel degenerative disease, but no fractures. The doctor indicated the level of degenerative disease revealed was not unusual for claimant's age. Dr. Fluter indicated the

⁷ *Id.*

EMG conducted by Dr. Hassan suggested a moderate degree peripheral neuropathy and bilateral multiple level spondylosis, but no radiculopathy.

According to Dr. Flutter, claimant had no widespread pinch tenderness, overreaction or non-anatomic distribution of pain/sensory loss. Dr. Flutter indicated his physical examination of claimant did not reveal symptom magnification. The doctor indicated claimant had a slow, guarded and antalgic gait and generalized tenderness to palpation of the lumbar paravertebral muscles and buttocks, more so on the right. Dr. Flutter also noted claimant had tenderness over the PSIS and sacroiliac joints, more on the right, but no tenderness to palpation over the greater trochanters. Claimant's calf circumferences were 35.5 centimeters on the right and 37 centimeters on the left. The doctor's assessments were:

- status post work-related injury
- low back/right lower extremity pain/dysesthesia
- lumbosacral strain/sprain
- myofascial pain affecting the low back
- lumbar discopathy
- probable lower extremity radiculitis
- probable sacroiliac joint dysfunction.

Dr. Flutter, using the *Guides*, placed claimant in DRE Lumbosacral Category II and assigned a 5 percent whole person functional impairment. The doctor assigned claimant a 1 percent whole person functional impairment each for right and left sacroiliac joint dysfunction. Dr. Flutter acknowledged his ratings for sacroiliac joint dysfunction are not specifically addressed in the *Guides*. He testified a fractured sacroiliac joint under the *Guides* results in a 10 percent impairment. The doctor thought that figure was inappropriate because claimant did not fracture either sacroiliac joint. The doctor felt 0 percent was too little impairment for someone who has sacroiliac joint dysfunction and, therefore, used 1 percent.

Dr. Flutter also opined claimant had a 5 percent right lower extremity functional impairment for mild calf muscle atrophy. Dr. Flutter explained claimant's right calf had atrophied as evidenced by the fact it was 1.5 centimeters less in circumference than his left calf. Under Table 71 of the *Guides*, that is a mild degree of atrophy, which results in a 5 percent right lower extremity functional impairment. The doctor testified that atrophy from radiculopathy is a differentiator for DRE categories. According to Dr. Flutter, if claimant had a 2-centimeter difference between his right and left calf circumference, he would have been in DRE Lumbosacral Category III, resulting in a 10 percent whole person functional impairment. The doctor admitted he did not know the circumference of claimant's right calf before his accident and thought claimant was right-footed. Using the Combined Values Chart in the *Guides*, Dr. Flutter indicated claimant's ratings combined for a 9 percent whole person functional impairment.

On March 5, 2015, without seeing claimant again, Dr. Fluter provided work restrictions of driving commercially no more than 30 to 60 minutes before needing to stop to move about and change positions; lifting, carrying, pushing and pulling no more than 35 pounds occasionally and 15 pounds frequently and bending, stooping, crouching, trunk twisting, squatting, kneeling, crawling and climbing no more than occasionally.

With regard to future medical treatment, Dr. Fluter opined:

Given the nature of Mr. Collins' orthopedic conditions and impairments, future medical care is likely. He will need follow-up appointments with his primary care physician and/or consultants periodically in the future for evaluation and/or treatment of the natural aging process of this injury. Specific diagnostic and therapeutic interventions will be determined by the health care providers evaluating him at that time based upon the clinical features. . . . Use of medications to modulate pain symptoms is likely to be an ongoing need. Appropriate medical follow-up is needed to prescribe the medications and monitor their effects.⁸

When asked if the treatment he was recommending was for claimant's injury or degenerative back condition, Dr. Fluter answered:

Well, I think given the fact that at this point in time the medications that he was taking, which was the treatment that was being offered at that time, would most likely be related to the injury that occurred, that future treatment for that in the absence of any sort of intervening event would then be related to the injury as opposed to any other cause.⁹

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹⁰ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."¹¹

K.S.A. 2013 Supp. 44-551(l)(1) states, in part:

⁸ Fluter Depo. at 19-20.

⁹ *Id.* at 43-44.

¹⁰ K.S.A. 2013 Supp. 44-501b(c).

¹¹ K.S.A. 2013 Supp. 44-508(h).

[T]he board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2013 Supp. 44-555c(a) states, in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

Board review of a judge's order is de novo on the record.¹² The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.¹³ The Board, on de novo review, makes its own factual findings.¹⁴

Dr. Fluter's left sacroiliac joint dysfunction rating is not credible. Despite the fact that claimant made few, if any, complaints of left-sided symptoms to any physician, Dr. Fluter found claimant had a left sacroiliac joint impairment. Therefore, the Board finds claimant did not sustain a left sacroiliac joint dysfunction impairment.

Dr. Fluter's 1 percent functional impairment for right sacroiliac joint dysfunction was based largely on claimant's subjective complaints. Claimant complained to several physicians of having right hip and leg pain. All three physicians who testified observed claimant with an altered gait. Dr. Fluter's 5 percent right lower extremity functional impairment rating was based on an objective finding that claimant's right calf circumference was less than his left. In light of the foregoing, the Board has difficulty completely discounting Dr. Fluter's right sacroiliac joint dysfunction and right lower extremity ratings.

Conversely, claimant's right hip MRI showed no acute abnormalities. Dr. Estivo's examination of claimant revealed he had full range of motion of the right knee and ankle and the right ankle and calf were non-tender. Those facts give some credibility to Dr. Estivo's opinion that claimant sustained only a low back impairment. However, the fact that Dr. Estivo's rating report contained no mention of claimant's right hip pain, contrary to his other records, causes some concern.

¹² See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

¹³ See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

¹⁴ See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

Dr. Estivo accused claimant of symptom magnification and overreacting. Dr. Kettermann's testimony disputes Dr. Estivo's accusations. Dr. Kettermann, claimant's longtime family physician, testified that prior to claimant's work accident he never requested, nor did she prescribe, pain medications. Nor did Dr. Fluter observe symptom magnification.

The Board, after discarding Dr. Fluter's 1 percent functional impairment rating for claimant's left sacroiliac joint dysfunction, gives equal deference to the functional impairment ratings of Drs. Fluter and Estivo. The Board, therefore, averages Dr. Fluter's 8 percent and Dr. Estivo's 5 percent ratings for a 6½ percent whole person functional impairment. The Board notes that *Tovar*¹⁵ allows it to weigh evidence and make its own conclusions as to claimant's functional impairment.

The second issue is whether claimant is entitled to future medical treatment. K.S.A. 2013 Supp. 44-510h(e) provides:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

The Board and parties are perplexed regarding the ALJ's ruling concerning future medical treatment. The ALJ did not specifically order future medical treatment, but instead ordered respondent to provide claimant a pain management evaluation to determine what claimant requires to address his pain and what is required to cure and relieve the effects of his accidental injury. Respondent views this not as an order for future medical treatment, but an order for an evaluation. Then, depending upon the outcome of the evaluation, medical treatment will or will not be ordered. Claimant interprets the ALJ's ruling as an award for future medical treatment on the theory that an order for an evaluation is an order for future medical treatment. Claimant asserts he proved he is in need of future medical treatment.

¹⁵ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, Syl. ¶ 1, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Board finds claimant proved with medical evidence that, more probably true than not, he will need future medical treatment. All three physicians indicated claimant continued to have pain. Only Dr. Estivo opined claimant needed no future medical treatment. Dr. Ketterman believed claimant would continue to need medication to relieve his work injury symptoms and to perform activities of daily living. Dr. Fluter indicated the medications claimant was taking were for the injury he suffered at work and that claimant would need follow-up visits. The Board finds the testimony of Dr. Ketterman most credible on this issue. She treated claimant both prior to and after his accident and recommended claimant undergo a pain management evaluation.

CONCLUSION

1. Claimant sustained a 6½ percent whole person functional impairment.
2. Claimant is entitled to future medical treatment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the November 16, 2015, Award entered by ALJ Sanders by finding claimant is entitled to future medical treatment and is entitled to 26.98 weeks of permanent partial disability compensation, based upon a 6½ percent whole person functional impairment, at the rate of \$504.02 per week, or \$13,598.46, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

¹⁶ K.S.A. 2014 Supp. 44-555c(j).

Dated this ____ day of April, 2016.

BOARD MEMBER

BOARD MEMBER

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Honorable Rebecca A. Sanders, Administrative Law Judge